IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 126 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA : Sd/-

HONOURABLE MR.JUSTICE KS JHAVERI : Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GALABHAI UKABHAI BARIA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR BS PATEL for Appellant(s) : 1,
MR HL JANI APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 05/10/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Section 374 of the Code of Criminal Procedure has been preferred by the present appellant-accused being aggrieved and dissatisfied by the judgment and order of conviction dated 19.01.1999 passed by the learned Additional Sessions Judge, Vadodara whereby he was sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.200/-, in default, to undergo one month S.I. for the charge under Section 302 of the Indian Penal Code and also sentenced to undergo one month simple imprisonment and fine of Rs.100/-, in default, to undergo seven days S.I. for the charge under Section 354 of the Indian Penal Code.

2. The case of the prosecution in short is that the appellant-accused and the victim, who was a 16 year old young girl, were neighbours. The victim was staying with her maternal grandfather and also doing some household

miscellaneous work. On the day of incident at about 3:00 p.m., when she was alone at her residence, the appellant-accused came and molested the victim. Not only that, he dragged the victim from her house and also beat her in public. However, due to intervention of neighbours, she was saved. After some time, the appellant-accused again came, entered into the house of the victim, sprinkled kerosene upon her, ignited her and ran away from the place of offence. As a result of that, she received burn injuries. Immediately, neighbours and other people reached there and informed the grandmother and other relatives of the deceased. Thereafter, she was taken to Jamnotri Hospital run by the State of Gujarat, from where, she was referred to S.S.G. Hospital, where she was admitted at about 5:00 p.m. The doctor inquired from her regarding the incident and noted down the history upon the case papers given by her. As it was a medico-legal case, he called the Police Constable,

who was discharging his duty at SSG Hospital, Vadodara. In pursuance of that, he sent vardhi to concerned Police Station, which came to be registered as Janava Jog Entry No.11/1998 and, thereafter, offence has been registered with Savli Police Station as Savli Police Station C.R.No.64/1998 under Sections 307 and 504 of the Indian Penal Code. On the basis of vardhi and message received from the Control Room, Vadodara, investigation was taken over by the P.S.I. Shri G.C. Patel. On 01.06.1998, as informed by the Raopura Police Station, the Executive Magistrate reached the SSG Hospital and after verifying the physical and mental condition of the victim, recorded the dying declaration in question-answer form, which was started at 8:45 p.m. He went to the scene of offence, prepared the panchnama of scene of offence in the presence of panchas and also seized the muddamal under the panchnama and also recorded the statements of various witnesses. Thereafter, he went to SSG Hospital, Vadodara

and recorded the statement of victim as well as the statements of maternal grandmother and grandfather of the victim. He also seized the clothes worn by the victim at the time of incident. The appellant-accused was arrested on 02.06.1998 and sent him into judicial custody and, thereafter, further investigation was taken over by P.S.I., Shri Rathod. Meanwhile, the victim succumbed to the injuries on 06.06.1996. When yadi (Exh.27) to that effect was received by the Police Station on the same day, Investigating Officer filled up Maranottar form, prepared inquest panchnama in the presence of panchas and also made arrangement to send the dead body for the purpose of postmortem. The postmortem was performed by the concerned doctor and gave postmortem report, Exh.10. During that period, the Investigating Officer submitted a report for addition of Section 302 of the Indian Penal Code. On receiving the FSL and postmortem reports, same were kept with investigation file along with the

postmortem report.

3. At the end of investigation, chargesheet came to be submitted before the Court of Learned J.M.F.C, Savli for the offence under Section 302 and 354 of the Indian Penal Code. As the offence alleged against the accused was exclusively triable by the Court of Sessions, same was committed to the Court of District & Sessions Court, Vadodara, which came to be numbered as Sessions Case No.183/1998 and transferred into the Court of Learned Additional Sessions Judge, Vadodara.

4. On production of the accused, the learned Additional Sessions Judge framed the charge against the appellant-accused, wherein he pleaded not guilty and claimed to be tried.

5. To prove the case against the appellant-accused, the prosecution examined in all 12 witnesses and also placed reliance upon various documentary evidence, which was produced by the prosecution vide Exh.6.

6. On submission of the closing purshis by the Learned A.P.P. and after recording the

further statements of the accused under Section 313 of the Criminal Procedure Code, the Learned Additional Sessions Judge, Vadodara convicted the appellant-accused for having committed offence punishable under Sections 302 and 354 of the Indian Penal Code and, therefore, he accordingly, passed the Judgment and Order of conviction and sentence as stated hereinabove.

7. Being aggrieved by the aforesaid Judgment and Order of conviction and sentence passed by the trial Court, the appellant-accused has preferred this appeal.

8. We have heard learned counsel, Mr.B.S. Patel for the appellant-accused and learned Additional Public Prosecutor, Mr.H.L. Jani for the State. We have been taken through the record and proceedings by the learned counsel for the respective parties.

9. Learned counsel for the appellant-accused, Mr.B.S. Patel has taken us through the evidence of all the material witnesses viz., P.W.No.1, Urmilaben Vakahatsinh, Exh.8,

P.W.No.2 viz., Dr.Ashok K. Mahajan, Exh.9, P.W.No.3 viz., Chandrakant Chaturbhai, Exh.11, P.W.No.4 viz., Babubhai Ranchhodbhai, Exh.13, P.W.No.5 viz., Rekhaben Chandubhai, Exh.14, P.W.No.6 viz., Revaben Babubhai, Exh.15, P.W.No.7 viz., Vinodbhai Purshottambhai, Exh.20, P.W.No.8 viz., Jethabhai Khegarbhai, Exh.21, P.W.No.9 viz., Dahyabhai Ratnabhai, Exh.23, P.W.No.10 viz., Gopalbhai C. Patel, Exh.25, P.W.No.11 viz., Bhaturbhai S. Nathani, Exh.28 and P.W.No.12 viz., Dr.Atul P. Gupte at Exh.32 along with the documentary evidence i.e. vardhi, Exh.27, scene of offence panchnama, Exh.16, inquest panchnama, Exh.17, dying declaration of the victim recorded by the Executive Magistrate, Exh.12, P.M.Note, Exh.10, FSL report Exh.29 and also relevant portion of the judgment delivered by the Court below and argued that the prosecution case is based on dying declaration, which is not trustworthy and free from all doubt. It is argued that the deceased received severe burn injuries on the

whole body to the extent of 100% and, therefore, she was not in a position to give dying declaration. He has also taken us through the original dying declaration and drew suspicion about the thumb mark of the deceased upon the dying declaration, Exh.12. It has been argued that at the time of incident, the appellant-accused was in drunken condition and, hence, it is a case of sudden provocation and in absence of dying declaration, there are no other evidence to connect the accused with the crime in question. Lastly, it has been argued that the appellant-accused has already undergone nine years of sentence and it may be considered as the punishment and he may be set at liberty forthwith.

10. Mr.H.L. Jani, learned Additional Public Prosecutor, who appears on behalf of the respondent-State has taken us through the oral evidence of the above referred witnesses and the reasoning part of the impugned judgment and order delivered by the learned

Additional Sessions Judge and argued that the prosecution has proved the case against the appellant-accused beyond reasonable doubt. He has further argued that the dying declaration is trustworthy and free from all doubt. It is further argued that before recording the dying declaration, the Executive Magistrate has satisfied himself about the physical and mental condition of the victim in giving dying declaration. It is argued that the Executive Magistrate has deposed before the same in toto. He was thoroughly cross-examined by the learned counsel for the other side but nothing contrary has come on record so as to shake his evidence. It is argued that prior to recording of the dying declaration, the history has been given by the victim herself to Dr.Gupte, who is a independent witness, which was recorded upon the case papers (Exh.37) and same has been proved by way of oral evidence of Dr.Gupte. It is further argued that even P.W.No.1, Urmilaben, Exh.8 is a material witness, who

is a common wall neighbour and it being noon time, her presence is natural. She has supported the say of the prosecution. She has deposed before the Court that she tried to save the victim in the first incident also. She was thoroughly cross-examined by the other side but nothing contrary has come on record, which turtle her evidence. Mr.Jani has also placed reliance upon the evidences of P.W.No.4 viz., Babubhai Ranchhodbhai, Exh.13 and P.W.No.6 viz., Revaben Babubhai, Exh.15 and argued that both the above referred witnesses are maternal grandfather and grandmother of the victim, with whom, the victim was staying as her mother remarried and her father deserted her. He has also placed reliance upon the evidence of P.W.No.2 viz., Ashok K. Mahajan, Exh.8 to prove history (Exh.33) and to prove the aspect of homicidal death. It is argued that the prosecution has proved that the victim has received burn injuries, which was antimortem and sufficient to cause death. It is argued

that it was a homicidal death and same has not been disputed by the other side. Mr.Jani has, therefore, urged that the learned trial Judge was perfectly justified in coming to the conclusion that the appellant-accused has committed the crime. Raising the abovesaid contentions, Mr.Jani has urged that the present appeal deserves to be dismissed.

11. We have gone through the oral as well as documentary evidence shown to us by the learned counsel for the respective parties and the reasoned judgment delivered by the Court below.

12. It is required to be noted that the incident took place at 2:15 p.m. in the house of the victim itself, which is adjoining the house of P.W.No.1, Urmilaben, Exh.8 and the appellant-accused is also neighbour and all were knowing each other and are from same locality and, therefore, question of misidentification may not be arisen at all in this case.

13. Keeping in mind the above aspect, we proceed

further with the matter. The prosecution has been able to prove the first incident by way of oral evidence of P.W.No.1, Urmilaben, Exh.8 as well as dying declaration, Exh.12, the history given by the victim, Exh.33 and the vardhi sent by way of telephonic message at the earliest, Exh.26. Over and above, in the vardhi sent by P.W.No.12, Dr.Gupte, Exh.32, name of the appellant-accused has been disclosed at the earliest. Not only that, by way of history given by the victim to Dr.Gupte, same has been noted down upon the case papers. Not only that, he has categorically deposed before the Court that when the victim has been examined by him, she was able to speak, conscious and history has been given by her to Dr.Gupte. He was thoroughly cross-examined by the learned counsel for the other side but nothing contrary has come on record so as to shake his evidence. So prosecution has proved the guilty against the appellant-accused by way of evidence of Dr.Gupte, Exh.12, case papers,

Exh.33, evidence of P.W.No.1, Urmilaben and vardhi Exh.26 and also from the evidence of grandfather and grandmother of the victim.

14. As far as as first incident is concerned, it has been proved by the prosecution by way of oral evidence of P.W.No.1, Urmilaben. In her evidence at paragraph no.2, she has categorically deposed that the appellant-accused is a head strong person, who entered into the house when she was alone with ulterior motive, but as she did not succumb to his desires, she has been dragged outside the hut and severely beaten up by the appellant-accused. At that time, due to intervention of others, she was saved and sent to her home. However, after some time, the appellant-accused came again, sprinkled kerosene upon her and ignited her. As a result of that, she received burn injuries and, thereafter, he ran away from the place of offence. Therefore, the act of the appellant-accused is high handed one as a young girl aged about 16 years, who did not

succumb to his lust, she was up beaten in public initially to teach her lesson and then, she was killed mercilessly by igniting her after pouring kerosene and same has been proved by way of dying declaration, Exh.12 and also evidence to that effect of Dr.Gupte.

15. In view of the above, it is established that the deceased has been brutally killed by the appellant-accused. Over and above, it is not a case of sudden provocation because first the accused beat her in public and, thereafter, killed her mercilessly. Therefore, it cannot be said that it is a case of sudden provocation and in absence of sudden provocation, we can say that it is a cruel murder, wherein involvement of the appellant-accused has been proved by the prosecution beyond reasonable doubt. Therefore, no leniency should be shown towards the appellant.

16. In view of the above, since there is no substance in any of the arguments advance by the learned counsel for the appellant-

accused, this appeal is required to be dismissed.

17. The appeal is dismissed.

Sd/- *Sd/-*

(R.P.DHOLAKIA, J.) ***(K.S.JHAVERI, J.)***

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